IN THE HIGH COURT OF JUDICATURE
AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
(IN ITS JURISDICTION UNDER ARTICLE 226
OF THE CONSTITUTION OF INDIA)

CRIMINAL WRIT PETITION NO.2265 OF 2006

Maheshchandra Saxena
R/at:401-402,
'A' Wing, Narendra Accord Building
'C',Near Old Petrol Pump
Mira Road (East), Dist: Thane. ...Petitioner
(Father of Detenu)

Vs.

1. The State of Maharashtra
   Through the Secretary to the
   Govt. of Maharashtra, Home
   Department, mantralaya
   Mumbai-400 032.

2. Chandra Iyengar
   Principal Secretary
   (Appeals and Security)
   Govt. of Maharashtra
   Home Department and
   Detaining Authority,
   Mantralaya, Mumbai-400 032.

3. The Superintendent of Prison
   The Mumbai Central Prison
   Arthur Road, Mumbai.

4. The Superintendent of Prison
   Nashik Road, Central Prison,Nashik ...Respondents

WITH

CRIMINAL WRIT PETITION NO.2594 OF 2006

Meena Vivek Dutta
R/at: B/3 Dolphin Apartments
Shivaji Road,
Kandivali Village, Kandivali (West)
Mumbai-400 067 ...Petitioner
(Father of Detenu)

Vs.

1.The State of Maharashtra
Through the Secretary to the
Govt. of Maharashtra, Home
Department, mantralaya
Mumbai-400 032.

2.Chandra Iyengar
Principal Secretary
(Appeals and Security)
Govt. of Maharashtra
Home Department and
Detaining Authority,
Mantralaya, Mumbai-400 032.

3.The Superintendent of Prison
The Mumbai Central Prison
Arthur Road, Mumbai.

4.The Superintendent of Prison
Nashik Road, Central Prison,Nashik ...Respondents

WITH
CRIMINAL WRIT PETITION NO.2595 OF 2006

Balkrishna Sekharan Nair
R/at: 3, Creado Chawl No.36,
Sahar Village, Sutar Pakhadi
Vile Parle(East)
Mumbai-400 099 ...Petitioner
(Father of Detenu)

Vs.

1.The State of Maharashtra
Through the Secretary to the
Govt. of Maharashtra, Home
Department, mantralaya
Mumbai-400 032.

2.Chandra Iyengar
Principal Secretary
(Appeals and Security)
Govt. of Maharashtra
Home Department and
Detaining Authority,
Mantralaya, Mumbai-400 032.

3.The Superintendent of Prison
The Mumbai Central Prison
Arthur Road, Mumbai.

4.The Superintendent of Prison
Nashik Road, Central Prison,Nashik ...Respondents

WITH

CRIMINAL WRIT PETITION NO.212 OF 2007

Usha Ravi Kotian
R/at: Flat No.102,152, Padma Ganga,
Shere Punjab, Mahakali Caves Road,
Andheri (East)
Mumbai-400 093 ...Petitioner
(Father of Detenu)

Vs.

1.The State of Maharashtra
Through the Secretary to the
Govt. of Maharashtra, Home
Department, mantralaya
Mumbai-400 032.

2.Chandra Iyengar
Principal Secretary
(Appeals and Security)
Govt. of Maharashtra
Home Department and
Detaining Authority,
Mantralaya, Mumbai-400 032.

3.The Superintendent of Prison
The Mumbai Central Prison
Arthur Road, Mumbai.

4.The Superintendent of Prison
Nashik Road, Central Prison,Nashik ...Respondents

Mrs. Ansari, Advocate for Petitioners
Mr. Maqsood Khan, Advocate for Petitioners
Mr. A.R. Patil Additional P.P for State

CORAM: DR. S. RADHAKRISHNAN &
SMT.ROSHAN DALVI, JJ.
DATED: 13TH SEPTEMBER, 2007

JUDGMENT (Per Smt. Roshan Dalvi, J.)

1. The 4 Petitioners in the above Petitions have prayed for Writ of habeas corpus to be issued challenging the order of detention dated 17th August, 2007 bearing numbers (i)PSA 1206/1(1)/SPL 3(A), (ii)PSA 1206/1(2)/SPL 3(A), (iii) PSA/1 (3)/SPL 3(A) and (iv) PSA 1206/1/(4)/SPL 3(A) issued by the then Principal Secretary to the Government of Maharashtra, Home Department, Mantralaya, Mumbai- 400 032 in respect of each of the Petitioners.

2. The above 4 Petitioners are stated to have been engaged in smuggling contraband goods into India. Their detention is based upon a specific act of smuggling revealed upon receipt of confidential information by the custom authorities which led to their arrest and the consequent statements made by

them under Section 108 of the Customs Act, 1962.

3. A Huge quantity of gold jewellery weighing about 17 Kgs., and valued at more than Rs. 1 Crore, was caught being smuggled by concealing it in household articles such as a Refrigerator which arrived as unaccompanied baggage at the Air Cargo Complex, Sahar Mumbai by FEDEX flight No.FX-5034 on 17.11.2005. The unaccompanied baggage arrived under the name of one Sarwar Husain Sagir Husain, who held Indian Passport No.A-5942380. The Petitioner Vivek Dutta was identified as the person who came to clear the consignment. He was intercepted by the DRI Officers. Documents being 2 cargo delivery orders, 2 Airway bills, one authority letter from Sawar Hussain in his favour and the Passport of Sawar Hussain came to be impounded. He disclosed that he was directed to clear the consignment by Petitioner Sanjay Nair. The consignment containing inter alia the Refrigerator with 17.059 Kgs., of gold concealed in

the door and other internal compartments, Soni Television and a long Clock and another consignment containing cordless phones and answering machines came to be seized. The statement of Vivek Dutta was recorded which showed he is operating as a free-lance custom clearing agent under CHA license of M/s. Dalal & Sons (CHA No.11/497). He stated that the Petitioner Sanjay Nair asked him to clear the goods and Petitioner Sanjay Nair as well as Petitioner Arvind Saxena made him sign the authority letter in the name of Sarwar Husain under which he had sought to clear the consignments from 17.11.2005. He was paid Rs.25,000/- by Sanjay Nair for clearing the consignment. He stated about the amounts he was paid for clearing the consignments on earlier occasions.

4. The passport of Sarwar Husain showed his address at Rahat Apartments, D-Wing, Flat No.202 on LBS Marg could not be located as there was no building in the name of Rahat

Apartment found on LBS Marg. Neverthless investigation revealed the correct address of Sarwar Husain which resulted in the information that the interrogation of Sarwar Husain who was shown to be a labourer, who had obtained a Passport to secure a job in Gulf Countries from one Papa Totla. His interrogation further revealed that he had not given any authority for clearance of any consignment in his name to any one and that no consignments were imported by him. After the Refrigerator was scanned in the X-ray machine by the Custom Authority, the smuggled gold was found concealed therein, Vivek Dutta was apprehended, which lead to his statement of the implication of Sanjay Nair, Arvind Saxena and Ravi Kotian.

5. Further statement of Vivek Dutta recorded on 9.1.2006 revealed clearance of unaccompanied packets by him on earlier 5 to 6 occasions. He had similarly cleared goods in various other consignments under jobs assigned to him by

Sanjay Nair. These goods were sought to be cleared under authority letter given by Sarwar Husain.

6. The residential premises of Papa Totla shown by Sarwar Husain was found locked.

7. Interrogation of the Proprietor/Partner of Dalal & Sons (CHA No.11/497) revealed that Vivek Dutta and Sanjay Nair were their employees with AAI entry passes.

8. The statement of Sanjay Nair showed that the Petitioner Arvind Saxena gave him a Passport of Sarwar Husain with a notorised letter of authority in favour of Vivek Dutta along with the copies of the 2 Airway bills to get the 2 consignments cleared at Sahar Airport on 17.11.2005. Sanjay Nair called upon Vivek Dutta to clear the consignments along with those documents though he had never met Sarwar Husain. The statement revealed that the

Passport and letter of authority were given to Sanjay Nair and later Vivek Dutta by Petitioner Arvind Saxena and Petitioner Ravi Kotian with a confidential information relating to a smuggling of gold into India contained in the Refrigerator which arrived in India with other household articles.

9. Sanjay Nair and Ravi Kotian are stated to be nephew and uncle. They absconded. They were apprehended later. Their statements have been similarly recorded. Similarly Arvind Saxena was later apprehended. His statement showed that he was employed by the firm of M/s. Sayani and Sons (CHA No.11/398) for clearing consignment on behalf of their clients, he also worked as a free lancer, and later started working with Ravi Kotian. His statement showed that Ravi Kotian handed over the Passport of Sarwar Husain to him with the confidential information to have the consignment cleared. Since the consignment had to be

cleared by an agent Arvind Saxena recommended Sanjay Nair who in turn recommended Vivek Dutta so that the authority letter ostencibly of Sarwar Husain was got prepared in the name of Vivek Dutta by forging his signature and having it notorised.

10. Consequently, the detention order shows that the consignments which were to be received by Ravi Kotian and Arvind Saxena, who acquired the services of Sanjay Nair and Vivek Dutta who were working as Custom Clerks for Dalal & Sons and also doing some free lance clearance. Sanjay Nair was accordingly paid Rs.25,000/- which he handed over to Vivek Dutta to obtain the delivery and get the two consignments cleared.

11. Arvind Saxena's statement further revealed earlier about 6 consignments of contraband goods similarly concealed, got cleared by Ravi Kotian, in which Sanjay Nair was paid

amounts to see that they were not screened through the X-ray machines.

12. The apprehension of Ravi Kotian resulted into his statement, wherein it was revealed that he worked as a free lancer with Arvind Saxena, for custom clearance without any entry pass and without being affiliated to any CHA Firm. Ravi Kotian' sstatement revealed that Arvind Saxena had informed him about the arrival of 2 consignments from Dubai and had brought the Passport of Sarwar Husain along with the letter of authority, purportedly assigned by him with 2 Airway bills in respect of 2 consignments on 16.11.2005. Arvind Saxena obtained the signature of Vivek Dutta on the authority later got it notorised. Arvind Saxena made Vivek Dutta sign on the letter of authority which he had to use for getting consignment cleared.

13. The further statement of Vivek Dutta recorded on

31.1.2006 revealed on Chotu working with Arvind Saxena and Sanjay Nair. It also revealed that the letter of authority was got forged by Arvind Saxena in the name of Vivek Dutta in the presence of Sanjay Nair and Ravi Kotian. The statement showed that he was paid his commission for clearing the consignments either by Arvind Saxena or Ravi Kotian.

14. Consequently the detention order came to be passed against each of the 4 Petitioners on the ground that they, had easy access to UB Center at the Airport and indulged in smuggling activities for bringing contraband goods by obtaining entry either as employees of licensed custom house agents or otherwise and thus operated as an organised gang.

15. It must be appreciated that only Vivek Dutta was apprehended at the UB Center whilst he actually sought to

clear the consignment under the 2 Airway bills relating thereto. He took the place of Sanjay Nair as the latter was not then available for the task. They were both paid commission by Arvind Saxena or Ravi Kotian. Their statements revealed the roles of Arvind Saxena and Ravi Kotian.

16. The fact remains that the gold jewellery concealed as stated has been seized and confiscated. Based upon the said seizure, investigation and interrogation followed.

17. Sanjay Nair, Arvind Saxena and Ravi Kotian have been apprehended on different dates later. Summons/warrants have been sought to be served at their residences. Their statements have been recorded on different dates. The case of the Respondents about their statements is consistent and similar. Based upon their statements the detention orders have been issued against each of them.

18. It is contended by Mr. Khan and Mrs. Ansari on behalf of all the Petitioners that the case of the Respondents at best reveals they having abetted the smuggling activities of some others in their capacity as their custom house agents and that the case of the Respondents does not show that any of them smuggled goods themselves.

19. It is contended that smuggling, as defined in Section 2 (39) of the Customs Act, 1962, is the act or omission which will render the goods liable to confiscation under Section 111 or 113 thereof. Since the goods are imported, Section 111 would apply. The goods in this case having been brought illegally concealed in a Refrigerator would bring the case within the mischief of Section 111(i) of the said Act. It is contended that the goods were concealed before they arrived in India. The act of smuggling was therefore, complete before the goods landed. This was done not by the agents

but by the owner of the goods who was required to make declaration as to its contents in proper form under Section 77 of the Act.

20. The detention orders in these cases clearly show that Vivek Dutta was only sent to clear the goods upon being paid his commission of Rs.25,000/- by Sanjay Nair who in turn was also to clear the goods, (if he had himself done so), upon the similar commission being paid to him. The detention orders however, show that Arvind Saxena obtained the fake Passport of Sarwar Husain who had not imported any goods or ordered any consignment from abroad. He also got the latter of authority signed by Vivek Dutta in the presence of the others and accordingly, got it forged. Whereas Vivek Dutta, Sanjay Nair and Arvind Saxena have shown some affiliation to the firm of Custom House Agents being Dalal & Co. and Sayani and Sons respectively, Ravi Kotian has not shown any such affiliation also. Each of them has done

freelance work in addition to the work of the firm assigned to them for clearance of consignments. Whereas Vivek Dutta and Sanjay Nair did nothing further than to take the documents given to them for clearance of the goods, Arvind Saxena obtained the fake Passport and got the letter of authority forged and fabricated to be used for the consignment. That was not a function of the Custom House Agent. He, therefore, exceeded the authority of the Custom House Agent. He acted on his own account and not as an agent. Whereas Vivek Dutta and Sanjay Nair could immediately reveal in their statements how they worked for Arvind Saxena and Ravi Kotian, Arvind Saxena though claiming to be Custom House Agent and stated to be working with Sayani & Company has not shown the ultimate owner who signed the declaration under Section 77 of the Customs Act and who smuggled the goods by doing the act by which they were rendered liable to confiscation viz., by concealing the dutiable goods in the refrigerator before they were loaded

as per Section 111(i) of the Customs Act. Even if he acted as an agent he acted for an undisclosed principal. The very concept of agency implicitly requires the disclosure of the principal on whose behalf the agent acts. Vivek Dutta and Sanjay Nair showed how they were directed to clear the consignment by Arvind Saxena and Ravi Kotian. Arvind Saxena has not shown on whose behalf he acted or directed Sanjay Nair or Vivek Dutta to act for clearing the consignment as his sub-agent.

21. Ravi Kotian does not even claim to be working with any Custom House Agent or having a CHA Licensee himself, though claiming to be a clearing agent. His claim is therefore, completely unfounded.

22. In fact under the provisions under Section 230 of the Indian Contract Act 1872 there is a statutory presumption of a contract to the contrary in case where an agent does not

disclose the name of the principal. Such agent would therefore, be liable as the Principal himself to 3rd parties.

23. A vain attempt has been made to suggest that one Chotu mentioned in the detention orders would be the real importer. Disclosure of the principal has to be specifically and expressly made by a person claiming to be an agent. He has to further show the extent of his authority as agent amenating from such Principal. Disclosure cannot be implied over a matrix of facts that could have emerged upon statements of several persons. In any case the detention orders show the implication of Chotu in the statement of Vivek Dutta as Arvind Saxena's man and who was seen by Vivek Dutta with Arvind Saxena and Sanjay Nair. The reference to Chotu does not portray him as the Principal/importer of the consignment, under whose directions each of the Petitioners acted.

24. On reading the 4 detention orders containing the separate statements of the 4 Petitioners as also the statements of the 2 Custom House Agents as well as Sarwar Husain, the innocent, unknowing Passportholder, whose Passport was misused, it becomes evident that Vivek Dutta and Sanjay Nair, in their capacity as freelance Custom House Agents worked on the directions of their Principals Arvind Saxena and Ravi Kotian, who paid them commission for clearing the contraband goods contained in the 2 consignments which arrived at Sahar Airport, Mumbai on 17.11.2005. Arvind Saxena and Ravi Kotian are not shown to be agents of any Importer of those consignments.

25. As agents Vivek Dutta and Sanjay Nair cannot be taken to have smuggled the goods. They were not the owners of the goods. They had no dominion over goods. They did not take delivery of the goods in their capacity as owners. They could not have sold the goods to another. These yardsticks fail to

apply to Arvind Saxena and Ravi Kotian. Arvind Saxena himself procured a fake passport and got fabricated the letter of authority, got it notarised and directed for obtaining delivery and possession of the contraband goods in the consignments. Ravi Kotian remained present in the UB center and oversaw the arrival of the goods and their clearance initially at the hands of Sanjay Nair and later at the hands of Vivek Dutta.

26. The detention orders showing Vivek Dutta and Sanjay Nair as having been involved in smuggling are therefore, not correct. They require to be set aside against Vivek Dutta and Sanjay Nair for failure to make out the case of smuglling contained in them. That does not hold good against Arvind Saxena and Ravi Kotian. The detention orders are seen to be sustainable against them for the acts of smuggling contraband goods into India as has been done in case of the 2 consignments which arrived on 17th November, 2005 and

earlier about 6 consignments which were similarly got acquired passed by the Custom Authorities. The propensity for repetition of such acts becomes apparent. The detention order cannot be set aside against Arvind Saxena and Ravi Kotian on merits.

27. Mrs. Ansari on behalf of Arvind Saxena relied upon the judgment of the Division Bench of this Court in the case of **Rajaram Singh Vs. State of Maharashtra in Criminal Writ Petition No.529 of 2002.** It shows that the detention order was issued with a view to preventing the detenu from abetting smuggling of the goods. In that case however, the detenu was to collect gold from one person (one Vinay Narvekar) and hand it over to another person (one Ashok). The Detenu had informed the loader at the Airport one Narvekar to go to the Air Cargo bridge when the flight containing the contraband consignment would arrive, and receive the packet of gold consignment from the said

passenger and hand it over to the detenu outside the Airport. It was shown that the detenu was working for the said Ashok and acting for and on his behalf. His role was to collect the goldbar near the Air Bridge and get those bars passed on to him outside the Airport and to deliver the same to said Ashok. In earlier such transaction the detenu had received a consideration of Rs.10,000/- and Rs.15,000/-. It was seen that he was helping another person involved in smuggling goods, whose name was was also stated in the detention order itself. It was therefore, clear that he did not work for himself; he worked for a disclosed principal. That Principal was Ashok. He received a mere commission. In this case Arvind Saxena has not shown on whose behalf he worked. Unless the detenu himself shows whose agent he is, he cannot claim to be an agent. If he is not an agent he cannot abet the act of another person who could be the principal. He would, therefore, be seen to be acting for himself.

28. The reading of the statement as recited in the detention order made shows that both Arvind Saxena and Ravi Kotian have tried to wriggle out of the conundrum, they found themselves in, by blaming the other and showing how they acted for the other. Both cannot act for one another as agents to abet the act of the other. They have also tried to show a fictitious person Chotu whose whereabouts have not been traced and who has not been identified. It is for the detenu to show his Principal. Such principal should be identified and produced. Whilst the investigation is in progress and whilst the statements are being recorded, if the detenu fails to show, identify disclose and produce the person who is the owner and who smuggled the goods as his Principal he cannot show himself to be the agent. Hence, his act would tantamount to smuggling. On the facts of this case therefore, the ruling in the case of Rajaram Singh would not apply.

29. In the case of **Mabelaranah Niranjan Puthran Vs. The State of Maharashtra in Criminal Writ Petition No.2096** of 2006, the Division Bench of this Court to which one of us was a party (Roshan Dalvi, J.) considered the functions of a Custom House Agent (CHA) and the concept of abetment of the offence of smuggling by such agent. In that case the consignments were imported by one Umesh Shetty who entrusted the detenu to collect his consignment at Sahar Airport. Umesh Shetty told the detenu that he was planning to import certain analog watch movements by mis-declaring them as parts of plastic toys. He needed an import-export code (license) for importing those goods. The detenu was directed to arrange for the code, which he did from another party, who had the said code (license). The importer Umesh Shetty agreed to pay the detenu Rs.1,00,000/- for each consignment that would be delivered. The detenu used to take the signatures of the party who had the license on the import documents of the said Umesh Shetty and cleared the

consignments for him. Though that was not the function of the CHA, and the detenu exceeded his authority as such agent to procure the import-export code, he showed the party for whom he so acted, albeit illegally. He showed the owner of the goods, who was the importer. The detenu was, therefore, shown to have been acting on his behalf and not for an undeclared, undisclosed principal or without any principal. Consequently the detenu could be held liable only as an abettor and since he was shown as a smuggler, the detention order was set aside against him.

30. Further grounds of challenge of the detention orders, therefore, requires to be considered only against Arvind Saxena and Ravi Kotian. It is argued on behalf of Arvind Saxena that there is a variance of satisfaction in the detention order and in the grounds of detention. Mrs. Ansari on behalf of Arvind Saxena has drawn our attention to the detention order dated 17th August 2006, Exhibit-A to the

Petition which records the recital that the order is passed with a view to preventing him from smuggling goods. Paragraph 32 and 34 of the detention orders recite that acts of the 4 Petitioners show that they have done or opted to do the acts or have abetted in doing the acts which have rendered the goods liable to be confiscated under Section 111 of the Customs Act, 1962. The paragraph, therefore, shows smuggling or the abetment of smuggling done by the 2 Petitioners. Mrs. Ansari contended that the reading of aforesaid 2 aspects shows a variance of satisfaction. The contention is incorrect. Though para 34 sets out the smuggling or its abetment carried out by the Petitioners, Paragraph 37 and 39 of the detention orders, which show the findings of the detaining authority, specify the charges against each of the detenus. That is the charge of indulging in activities amounting to smuggling. It does not mean or include abetment thereof.

31. The reply of the Detaining Authority in paragraph 7 of her affidavit shows the denial of any variance. It specifies that the case of any of the detenus would fall under Section 3(i)(i) of COFEPOSA Act, 1974 amounting to the act of smuggling. We, therefore, find no substance in this ground.

32. Consequently the Judgment in the case of **Prithvi Sovern Kuntal Vs. The State of Maharashtra, 2001 ALL MR (Cri.) 1163** which showed the order of detention mentioning the reason as to prevent the detenu from abetting smuggling of the goods and the grounds of detention which mentioned the reason as to prevent the detenu from smuggling of goods would not apply to this case.

33. It is further contended on behalf of Arvind Saxena and Ravi Kotian by Mrs. Ansari and Mr. Khan that the reply to the show-cause notice of any of the detenus have not been placed before the Detaining Authority or considered by her.

To consider the bonafides of such a ground a short chronology of events and dates is required to be appreciated. The goods arrived in Mumbai on 17.11.2005. Vivek Dutta was immediately apprehended. The other Petitioners were apprehended in December, 2005 and January, 2006. Further investigation was carried out in the ensuing months and further statements were recorded. Show cause notice was issued on 12th May, 2006. The Petitioners were called upon to reply to the notice within 15 days. They sent their replies on 6th July, 2006 instead. Their replies are marked Exhibits-D to the Petitions of Ravi Kotian and Arvind Saxena and Exhibit-E to the Petitions of Vivek Dutta and Sanjay Nair. The replies were not sent to the Detaining Authority. The Sponsoring Authority did not pace it before the Detaining Authority. The Detaining Authority passed the detention order on 17th August, 2006.

34. The replies Exhibits- **D** and **E** to the aforesaid Petitions

are all undated and received on 6th July, 2006. The reply of the Arvind Saxena shows that he was the employee of Sayani and Sons as a Custom House Licensee. It shows that he cleared several consignments on 17th April, 2005 in which nothing untoward was detected. It mentions about the partner of Sayani and Sons whose statement was recorded, who corroborated the fact that he was working with them for **2½** years. It also shows that his residential premises was searched on 12th January, 2006 (as mentioned in the detention order) and how he was summoned to the DRI office. Aside from this he has stated only negative facts of what he did not do which formed a part of the detention order as per his statement recorded under Section 108 of the Customs Act.

35. He had retracted his statement, he was arrested and earlier released on bail. His premises was searched and he was summoned. All these facts were present to the mind of

the detaining authority. The rest are only denials of the statement in negative form.

36. The reply of Ravi Kotian does not show that he is a clearing agent. It does not show him as a licensee. It does not show any other clearing agent's firm with whom he ostensibly acted as a Licensee. It shows that he was brought to DRI office on 17th January, 2006 and 24th January, 2006 when his statement was recorded. It also shows that on 5th January, 2006 his residential premises was searched. These were the facts present to the mind of the Detaining Authority. The detention order itself shows these facts. He was also arrested and released on bail. He had retracted his statements made under Section 108 of the Customs Act. These facts are also known to the Detaining Authority. The rest of the statements in his reply are mere denials in negative form.

37. None of these statements show any new fact which could be their defence to the action of detention sought by the Respondents. The replies have been belatedly sent 7 weeks after the receipt of the notice. There is anything which remained to be stated which was stated in the replies.

38. The Advocates on behalf of these two Petitioners have drawn our attention to several judgments which hold that any vital documents not brought before the Detaining Authority and not considered by the Detaining Authority would vitiate the Detention Order. Indeed that would be so. It would be like allowing detention of a person without considering his defence or atleast any aspect which would be vital for arriving at a subjective satisfaction of whether or not the detention order could be passed. It may be mentioned that the emphasis in each of the judgments is upon the term “vital”. It will have to be seen which material or documents can be termed as vital. Those would be the documents

which would make the Detaining Authority come to a specific conclusion based upon such vital material.

39. In the case of **Kurjibhai Dhanjibhai Patel Vs. State of Gujarat, 1985 (1) SCALE 136 SC**. It has been held that the reply of the detenu to the show cause notice was relevant material required to be placed before the Detaining Authority. In that case however, there was no retraction statement made. Those documents were apart of the adjudication proceedings. Neverthless the Detaining Authority would not have had any idea about the reply, if any, of the detenu even if it was a mere denial, when the order of detention was passed. The subjective satisfaction of the Detaining Authority was, therefore, likely to get impaired. In this case the retraction statements show that the statements under Section 108 of the Custom Act made by each of the detenus were denied by them. The Detaining Authority, therefore, understood the scope of the proceedings

before her. The replies of Arvind Saxena and Ravi Kotian as aforesaid, contain no specific new material other than what was in their statements which were retracted by them. Whatever was in the retraction statement has having been denied by them was put in negative form.

40. In the case of **Malvinder Singh Vs. The Secretary (P.D.) Government of Maharashtra in Criminal Writ Petition No.1240 of 1989** though the copy of the show cause notice was put before the Detaining Authority, the reply of the detenu was not. This gave an incomplete picture to the detaining authority in the absence of the knowledge to retraction in that case. Consequently it was held that the reply was vital document to have been considered by the Detaining Authority.

41. In the case of **Ashok Nanalal Mehta Vs. L. Nmingliana in Criminal Writ Petition No.422 of 1991**, it was held that

even if the Sponsoring Authority did not furnish the reply to the show cause notice given by the detenu to the Detaining Authority, the Detaining Authority should call for the same before arriving at any subjective satisfaction. Even that was the case in which no retraction of the detenu was known to the Detaining Authority. Consequently the entire picture before the Detaining Authority was different from reality, unlike in the present case.

42. In the case of **Zarina N.H. Rizvi Vs. The State of Maharashtra, in Crim. Writ Petition No.212 of 1998**, the reply of the detenu contained specific positive facts, including a private visit to Singapore and some amount of cash carried by the detenu on such visit. The detenu relied upon the lack of authority of the Custom Officers under the provisions of Section 46 of Foreign Exchange Regulation Act, 1973 in his reply. Such a reply not having been considered the case of the detenu on merits remained unknown to the

Detaining Authority thereby resulting in vitiating the detention order. It may be mentioned that in this case there is no new fact by way of any reply shown by the detenus to the show cause notice, which could have swayed the mind of the Detaining Authority.

43. In the case of **Madan Namdeo Salvi Vs. R.J.Tyagi, Commissioner of Police, Thane in Criminal Writ Petition No.859 of 1990**, the Petitioner' sacquittal in the concerned case upon compounding the same was not brought to the notice of the Detaining Authority. That was held fatal to the detention order.

44. In the case of **Ahamed Nassar Vs. State of Tamil Nadu , 1999 SCC (Cri.)1469** various factual assertions were not brought to the notice of the Detaining Authority and not considered in the Detention order. In paragraph 25 of the judgment it has been observed that 2 letters contained

factual assertions and not only retraction of the detenu's earlier alleged confession. It was observed that retraction was also covered in the bail application which was considered by the Detaining Authority. The stand of the detenu in the 2 letters containing factual assertions were not. These facts were that the detenu contended that the seized goods were not prohibited goods which passed through the red channel and the detenu offered to pay the duty thereon, but instead the Officer arrested him. It was held that there was an obligation cast on the Sponsoring Authority to put such material which was not only already referred to in the bail application, but "something more" before the Detaining Authority. Non-placement of such material resulted in release of the detenu.

45. In the case of **Elsy George Vs. Union of India, 2002 Cr.L. 540**, an FIR was held to be a relevant piece of evidence, as it was an the same subject matter in dispute in

that case. In such FIR there was no case made out against the detenu though it related to the same transaction. It was observed, "there is not even a whisper of suspicion against him". Such FIR was held to be a piece of evidence which might have effected the decision to pass or not to pass the detention order. It was, therefore, held to be a vital document which was not placed before the Detaining Authority, not considered by the Detaining Authority and not served upon the detenu and vitiated the detention order.

46. The learned A.P.P drew our attention to the judgment in the case of **Sharifa Abubaker Zariwala Vs. The Union of India in Criminal Writ Petition No.703 of 1995** in which, relying upon the case of **Ashadevi Vs. K.Shivraj, AIR 1979 SC 447**, it was held by the Division Bench of this Court considered what was the vital document required to be placed before the Detaining Authority. In that case a retraction statement was made by the detenu. On the same

day a bail order was passed in his favour. The retraction statement was not placed before the Detaining Authority, but the bail order was. It was observed, considering **Ashadevi' s** case supra, that the perusal of the judgment in that case showed that non-placement of every material before the Detaining Authority and it not being considered by the Detaining Authority would not vitiate the satisfaction recorded by the Detaining Authority. It is only if the material is vital for recording the subjective satisfaction of the Detaining Authority that the satisfaction would be initiated if recorded without considering it. It is, therefore, held that an inquiry has to be necessarily held by the Court as to whether the material which has been withheld and not placed or not considered was vital from the point of view of recording the satisfaction. If the material is found to be vital and not considered it would result in vitiating the detention order, not otherwise. We have, therefore, entered upon that mandatory inquiry. We are satisfied that the replies in this

case, contained no further material then was known to the Detaining Authority by way of factum of the retraction statement. No facts were withheld from her consideration or judgment. The non-consideration of the reply, whilst taking into effect the retracted statement, denying the earlier statement cannot vitiate the order of detention. Such order has been passed based upon the complete picture that emerged of the unlawful activities of the 4 Petitioners in these Petitions and considering their propensity to recommit such offence and repeat such actions.

47. The test is, therefore, on the merits of the documents and not the factum of its non-placement before the Detaining Authority. In this case the Detaining Authority knew that the statements made by the Petitioners under Section 108 of the Customs Act were retracted and were later not having been made. The Detaining Authority also knew the factum of the residences being searched and the dates of their

statements being recorded. She herself made reference to the CHA Firms by three of the Petitioners; no such reference was made in respect of Ravi Kotian. It was contended before us that the retraction only showed that the statements were got signed under duress without knowing the contents, and that the contents of the statements of the Petitioners were known to them only upon the receipt of the detention order. This is incorrect. The replies to the show cause notice themselves show the knowledge of the contents of the statements of the Petitioners which were refuted by them in negative form in the reply sent before the detention order was passed. They are, therefore, only a mirror of their respective retraction statements. They demonstrate no further fact by which another view could have been taken by the Detaining Authority. The contention that the detention order must stand vitiated on these grounds, therefore, must be rejected. In fact the reply of the Detaining Authority shows that the Sponsoring Authority did not forward to her

the reliefs and hence, the Detention order does not suffer from the vice of the non-application of the mind. We may mention that each of the Judgments on this aspect shown on behalf of the Petitioners are completely distinguishable and do not apply to the facts of this case.

48. It is also contended on behalf of these Petitioners that the representation made by the Petitioners to Home Department as well as to the Detaining Authority have been too delayed. The delay is unexplained and hence, the detention orders stand vitiated. The representation is received much after the detention order is passed, it has no bearing on the detention order. In fact after this was argued by the learned A.P.P Mr. Khan fairly conceded this aspect.

49. Neverthless it has to be seen whether the consideration of the Representation is needlessly delayed. The Detaining Authority who was the then Principal Secretary, Home

Department has been transferred on 17th February, 2007 after the detention order was passed and before the representations were considered. The present Detaining Authority is the present Principal Secretary, Home Department who considered and rejected the representations of both these Petitioners. Her affidavit shows the time taken for the consideration of representations since its receipt on 8th February, 2007. She has explained the action taken, in parawise comments on 9th February, 2007, forwarding of the comments of 21st February, 2007 which was received on 22nd February, 2007, and a detailed note being prepared on 22nd February, 2007.

50. In the meantime the earlier Secretary was transferred the later Secretary took charge on 5th March, 2007. She was empowered to act as Detaining Authority on 15th March, 2007. The file was placed before her on 17th March, 2007 on which day she rejected the representation. The draft

rejection reply was forwarded to the Under Secretary on 21st March, 2007 who endorsed it to the Deputy Secretary, who, after the approval of the draft on 22nd March, 2007 issued the same to the detenu Ravi Kotian. It can be seen that this is indeed being unduly delayed. Even the parawise comments have been initially delayed by about 2 weeks. The interregnum between the transfer of one Principal Secretary and taking over charge by another shows a delay of about 3 weeks. Even the empowerment of the newly appointed Secretary has been delayed by 10 days. The representation remained unseen and unattended for a large period of time. The total time taken was about 5 weeks for rejecting the representation of the detenu Ravi Kotian. We accept the contention of the Petitioner Ravi Kotian that his representation was unduly delayed and the explanation is not justified for the length of the delay. He therefore, deserves to be released before his term of detention ends. We may however, mention that this does not affect the

validity of the detention order and Shri Khan concedes to that legal position.

51. The representation of Arvind Saxena was received on 5th February, 2007, parawise comments were called for on 9th February, 2007. They were received late in the evening on 12th February, 2007 in the COFEPOSA Cell. It was signed on 13th February, 2007 and parawise reply was prepared by the concerned Assistant on 14th February, 2007. The Assistant Director DRI suggested corrections on 15th February, 2007. 16th, 17th and 18th February, 2007 were holidays being Maha-Shivratri and week end. Fresh revised reply was prepared on 19th February, 2007 when he received certain secret information and he along with his concerned Assistant was to keep surveillance at the Airport. Interception if another person and follow up action in that case continued till 22nd February, 2007. He was required to attend the meeting before the Advisory Board on 23rd February, 2007. He was held up with the other officers in the other case on 26th

February, 2007 which resulted in a search of that premises on 22nd February, 2007 and he could only send the remarks on 28th February, 2007, to the State Government. That was received by them on 1st March, 2007. This explanation of the delay also cannot be accepted. He was required to perform his functions for considering their representation in the case of the detenu Arvind Saxena as much as performing his duties in any other case. As per the reasoning in the case of **Rajammal Vs. State of Tamil Nadu 1999 (1) SCC 417** in which the Minister was on tour for 5 days resulting in that much delay which was not accepted by the Apex Court, we consider the explanation in the affidavit of Assistant Director DRI also deserving rejection. Consequently even the Petitioner Arvind Saxena deserves to be released, though his detention order is not vitiated on that ground.

52. Hence the following order.

(i) The Detention orders in respect of Vivek Dutta and Sanjay Nair are set aside.

(ii) Vivek Dutta and Sanjay Nair shall be released forthwith unless wanted in any other case.

(iii) The Detention orders of Arvind Saxena and Ravi Kotian are confirmed.

(iv) However, they shall be released forthwith if not wanted in any other case.

(v) All Petitions are accordingly disposed of.

(DR. S. RADHAKRISHNAN, J.)

(SMT. ROSHAN DALVI, J.)